NARCONON CHILOCCO NEW LIFE CENTER
v.
ACTING ANADARKO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 93-116-A Decided April 19, 1994

Appeal from a determination of livestock trespass and an assessment of damages.

Affirmed in part; reversed in part.

1. Indians: Leases and Permits: Generally--Regulations: Publication

A lessee of trust or restricted property has the responsibility to become familiar with duly promulgated regulations governing activities on the leased property, and is deemed to have knowledge of regulations published in the Code of Federal Regulations.

2. Indians: Lands: Trespass: Damages

Regulations in 25 CFR 166.24 authorize the Bureau of Indian Affairs to assess damages for livestock trespass on trust or restricted Indian lands against the owner of the livestock.

APPEARANCES: Gary W. Smith, its President, for appellant; M. Sharon Blackwell, Esq., Field Solicitor, U.S. Department of the Interior, Tulsa, Oklahoma, for the Area Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Narconon Chilocco New Life Center seeks review of a May 7, 1993, decision of the Acting Anadarko Area Director, Bureau of Indian Affairs (Area Director; BIA), assessing appellant $3,235 in cattle trespass damages. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision in part and reverses it in part.

Background

On September 1, 1988, appellant and the Chilocco Development Authority (CDA) entered into Business Lease No. 14-20-0207-7517. The lease covered approximately 167 acres in Kay County, Oklahoma, which had formerly been

used as the Chilocco Indian Agricultural School. The land is held in trust by the United States for the joint benefit of the Otoe-Missouria, Tonkawa, Pawnee, Ponca, and Kaw Tribes of Oklahoma, and is administered by the inter-tribal CDA. Appellant leased the property for use as an inpatient alcohol and drug rehabilitation facility.

By letter dated April 7, 1993, the Superintendent, Pawnee Agency, BIA (Superintendent), wrote appellant, stating:

> During an on-site visit on March 12, 1993, to the Chilocco property by [BIA] staff, it was observed that 70 to 80 head of cattle were pastured on the former football field, which is part of the campus area. There were also self-feeders and hay racks filled with hay in the area which would indicate that the cattle were not there on a temporary basis or had simply wandered onto the property. They were again observed by [BIA] staff in the same location March 31, 1993. On this visit it was also noted that there were cattle on the campus area south of the armory. That group was approximated to be around 80 head.
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> On April 5, 1993 the cattle were again observed by [BIA] staff in locations indicated on the attached land description. The cattle head count again was approximately 180.
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> Please note the following Section of the Chilocco/Narconon Lease:
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> Section 5. USE OF PREMISES: SUBLEASES.
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> It is understood and agreed that [appellant] shall operate an inpatient drug and alcohol rehabilitation services program and such program will be [appellant] operated or operated through subleases, or other sub-tenancies on the leased premises and that the leased premises will be used for no other purpose without the further consent of the "LESSOR" and the approval of the Bureau of Indian Affairs.
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> Section 5, above specifically restricts use of the Chilocco property for purposes other than operating an Inpatient Drug and Alcohol Rehabilitation Service Program without the consent of the lessor and the BIA. Therefore, the facts appear that you are in violation of this section, as well as 25 CFR 166.24(a) Livestock Trespass and (b) Unauthorized Grazing. Note, under 166.24(b), . . . the Superintendent shall take action to collect all such penalties and damages, reimbursement for expenses incurred in impoundment and disposal, and seek injunctive relief when appropriate . . . .
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> This is your official notice per 25 CFR 166.24(c) that within five days after receipt of this certified letter all

> livestock feeders, hayracks and hay stored in Quonset huts and any other associated farm equipment located in the attached land description are to be removed. Further, per 25 CFR 166.24(d)(1) you are hereby assessed for 155 head of cattle. A penalty of $1.00 per head per day for 75 head of cattle from March 12, 1993 to approximately April 16, 1993 (35 days), and $1.00 per head per day for 80 head of cattle from March 31, 1993 to approximately April 16, 1993 (17 days) [is assessed]. The approximate total will be $3,985.00.
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> If the cattle are not removed within the specified time and the required compensation has not been submitted, 25 CFR 166.24(f) will be implemented. Section 20, Default of the Lease, will also be activated at that point. [Emphasis and omissions in original.]

(Letter at 1-2).

A note to the file indicates that a field inspection conducted on April 13, 1993, revealed that both the cattle and the feed and hay bunks had been removed from the leased property.

With its opening brief, appellant submitted a copy of an April 13, 1993, letter to the Superintendent. This letter is not included in the administrative record, and it appears possible that it was not received by BIA. The letter advises that all of the cattle and associated equipment had been removed by the rancher who owned them. The letter further stated that appellant had not subleased the property, but instead the rancher had agreed to pasture his cattle on the football field to knock the grass down because the farm equipment used to maintain the premises had been removed by the CDA. Appellant also stated that it was neither the owner of the cattle nor an agent of the owner and therefore was not responsible for paying any trespass damages.

By letter dated April 20, 1993, without reference to appellant's letter of April 13, 1993, the Superintendent informed appellant that the amount of the damage assessment was $3,235. On April 30, 1993, appellant appealed the assessment to the Area Director. Generally repeating the arguments in its April 13, 1993, letter, appellant added that it had allowed the cattle to graze on the property in order to further the general authority of the Secretary in 25 CFR 166.2 to protect individually awned and tribal lands against waste.

By letter dated May 7, 1993, the Area Director affirmed the Superintendent's decision, stating:

> [Y]ou have admitted to contacting a local rancher for the purpose of grazing cattle in the field to knock down the grass. You further indicated that you are not the owner of the livestock. However, due to the circumstances by which the cattle were let onto the field, we consider you to be the owner/agent of the cattle, and therefore the responsible party. [Emphasis in original.]

On August 5, 1993, the Board received appellant's notice of appeal, dated July 17, 1993. The notice of appeal was transmitted to the Board from the Office of the Secretary, where it had been filed. Upon learning that the Area Director's May 7, 1993, letter had not informed appellant of its appeal rights, as required by 25 CFR 2.7, 1/ the Board accepted the appeal as timely.

The Board also learned that BIA had withdrawn funds from a $100,000 certificate of deposit posted as a bond by appellant. In an order dated August 25, 1993, the Board stated:

> The Board has received a letter from appellant stating that the Superintendent * * * withdrew $3,235 from appellant's certificate of deposit on May 13, 1993, and is now requiring appellant to replace the funds. Appellant asks the Board whether it is required to replace the funds while this appeal is pending.
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> The record includes a May 13, 1993, letter from the Superintendent to Pioneer Bank and Trust, Ponca City, Oklahoma, requesting remittance of $3,235 from appellant's certificate of deposit, based on the incidents which are the subject of this appeal. The record also shows that the bank issued BIA a check for $3,235 on the same day.
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> Appellant is not required to replace the funds pending appeal. Under 25 CFR 2.6(b), [2/] the Area Director's May 7, 1993, decision was not effective on May 13, 1993, and the Superintendent therefore erred in removing the funds from the certificate of deposit at that time. [Emphasis in original.]

(Order at 1-2). The Board requested information concerning the status of the funds removed from the certificate of deposit and the steps BIA would take to restore the funds if the Area Director's decision was reversed or

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1/ Section 2.7 provides in pertinent part:

"(a) The official making a decision shall give all interested parties known to the decisionmaker written notice of the decision by personal delivery or mail.

"(b) Failure to give such notice shall not affect the validity of the decision or action but the time to file a notice of appeal regarding such a decision shall not begin to run until notice has been given in accordance with paragraph (c) of this section.

"(c) All written decisions, * * * shall include a statement that the decision may be appealed pursuant to this part, identify the official to whom it may be appealed and indicate the appeal procedures, including the 30-day time limit for filing a notice of appeal."

2/ Section 2.6(b) provides that "[d]ecisions made by officials of the [BIA] shall be effective when the time for filing a notice of appeal has expired and no notice of appeal has been filed."

vacated on appeal. BIA informed the Board that the funds had not been distributed to the tribes, but were in a separate interest-bearing account.

Discussion and Conclusions

Appellant advances the same arguments on appeal as before the Area Director. In addition, it contends that the Superintendent's withdrawal of funds from its certificate of deposit was improper and exceeded her authority. Appellant seeks reversal of the damage assessment and return of the funds withdrawn from its certificate of deposit, with interest.

As background for its discussion, the Board notes that BIA has treated this matter as a cattle trespass under 25 CFR 166.24, and not as a breach of appellant's lease. The references to possible breach in the Superintendent's April 7, 1993, letter to appellant were intended to alert appellant to the facts that grazing was not permitted under its lease and that continued trespass would be treated as a breach. For example, the letter states that only in case the cattle were not removed would the impoundment and disposal procedures of 25 CFR 166.24(f) and the default procedures of Section 20 of the lease be activated. For this reason, the Board rejects appellant's contention that BIA failed to give it proper notice of default in accordance with Section 20 of the lease. 3/

[1] As a lessee of trust land, appellant had the responsibility to familiarize itself with duly promulgated regulations governing its activities. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); Racquet Club Properties, Inc. v. Acting Sacramento Area Director, 25 IBIA 251, 256 (1994), and cases cited therein. Appellant is furthermore deemed to have knowledge of regulations published in the CFR. Racquet Club Properties, supra.

Section 5 of appellant's lease specifically provided that the lease was for the sole purpose of operating an inpatient drug and alcohol rehabilitation program. Grazing cattle was clearly not contemplated as part of the operation of such a program. 25 CPR 166.8 provides that

> [a]dult tribal members of any tribe may, without approval of the Superintendent, graze livestock on their own individually owned grazing land or other grazing land for which they are responsible on behalf of those non compos mentis, on behalf of their minor children and on behalf of minor children or others to whom they stand in loco parentis when such children do not have a legal representative. * * * Grazing of livestock under any other arrangement requires approval of the Superintendent. [Emphasis added.]

3/ Had BIA proceeded under the default provision of appellant's lease, it would have been required to give appellant a 30-day opportunity to cure the alleged violation. Because no provision of the lease provides other authority, BIA would still have been required to proceed under 25 CFR 166.24 in order to assess trespass damages.

25 CFR 166.24(a)(1) further prohibits grazing on any trust or restricted lands without an authorized grazing permit. Appellant was on notice both by the terms of its lease and by the regulations that it was not permitted to graze livestock on the leased premises, or to otherwise allow grazing, without the express approval of the Superintendent.

Appellant does not deny that cattle were grazed on the leased property, although it has provided inconsistent explanations of how the arrangement was entered into. In its opening brief appellant states that a local rancher approached it and asked to be allowed to graze cattle on the leased property and indicated that the cattle would knock down the grass. In every other document submitted by appellant that discusses this matter (including appellant's April 13, 1993, response to the notice of trespass; April 30, 1993, notice of appeal to the Area Director; and July 17, 1993, notice of appeal to the Secretary), appellant states that it approached the rancher. The Board concludes that appellant approached the rancher about grazing his cattle on the leased property, and was responsible for allowing livestock trespass on the leased property.

Appellant first argues that it did not sublease the property and that there was no financial consideration for the grazing arrangement. Essentially, this is an argument that the trespass should be excused. Although the Board does not accept appellant's implicit contention that oral permission given to a third party to use property leased to appellant could not constitute a "sublease," appellant's argument evidences a misreading of section 5 of the lease and the Superintendent's April 7, 1993, decision letter. Section 5 authorizes appellant to operate the rehabilitation center through subleases and/or subtenants. The section further provides, however, that the property will be used for no other purpose without approval: it does not provide that the property can be used for other purposes as long as no sublease is involved. The Board rejects appellant's argument that it was not in violation because it did not sublease the property or receive financial consideration for the use of the property.

Appellant's second argument for excuse of the trespass is that it allowed the cattle to graze on the property because the CDA improperly removed maintenance equipment from the grounds after appellant refused an illegal demand for additional rent for the use of the equipment. Appellant contends that because it had no equipment to maintain the grounds, the cattle were allowed to graze to knock the grass down in order to reduce fire hazard. In its notice of appeal to the Area Director, appellant contends that this action was taken in furtherance of the Secretary's general authority in 25 CFR 166.2 "to protect individually owned and tribal lands against waste." 4/

4/ The sentence of section 166.2 to which appellant refers states in its entirety: "It is within the authority of the Secretary to protect individually owned and tribal lands against waste and to prescribe rules and regulations under which these lands may be leased or permitted for grazing."

The Secretary's authority to protect trust land against waste has not been delegated to appellant. Appellant is not authorized to take actions not permitted under its lease and the relevant regulations because of its unilateral decision that such actions are needed to protect the property. If appellant believed that the grazing of cattle was a necessary and reasonable way to protect trust resources, it was required to present its plan to BIA and obtain approval before allowing cattle onto the property. The Board rejects appellant's argument that it was exercising the Secretary's authority to protect trust resources.

Appellant's contention that the removal of equipment by the CDA necessitated its actions also does not authorize a violation of the terms of the lease and regulations. If appellant believed that the CDA had breached the lease and BIA had not responded adequately to the situation, it should have pursued legal remedies. Instead, appellant chose the "self-help" remedy of taking actions prohibited by the lease and regulations. Appellant's belief that the CDA improperly removed the farm equipment did not authorize appellant to graze cattle on the leased property without BIA approval.

Therefore, the Board affirms the Area Director's finding that a livestock trespass occurred, and concludes that the trespass should not be excused.

The next question is whether the trespass damages were properly assessed against appellant even though it was not the owner of the cattle. Appellant argues that 25 CFR 166.24(b) provides that the owner of livestock grazing in trespass is liable for the damages. The Area Director found that, by approaching the rancher, appellant became the owner/agent, and was therefore the proper person to be assessed damages.

25 CFR 166.24 provides in part:

> (b) Unauthorized grazing. The owner of any livestock grazing in trespass on trust or restricted Indian lands is liable to a penalty of $1 per head for each animal thereof for each day of trespass * * *, together with the reasonable value of the forage consumed by their livestock and damages to property injured or destroyed, and for expenses incurred in impoundment and disposal. The Superintendent shall take action to collect all such penalties and damages, reimbursement for expenses incurred in impoundment and disposal, and seek injunctive relief when appropriate. * * *
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> (c) Notice and order to remove. (1) When it has been determined that a violation exists and the owner of the unauthorized livestock is known, written notice shall be served upon the alleged violator or his agent * * *. The notice shall set forth the act constituting the violation, the legal description of the land where the livestock were observed, the verification of brands in the State Brand Book, and the regulation alleged to have been violated. * * *

(2) When neither the owner of the unauthorized livestock nor his representative is known, the Superintendent may proceed to impound the livestock under § 166.24(f).

* * * * * *

(e) Demand for payment. Where the livestock have been removed but satisfactory settlement has not been made within the time prescribed under § 166.24(c), a certified letter, return receipt requested, shall be sent or personally delivered to the livestock owner or his agent * * *. The letter shall demand immediate settlement and advise the violator that unless settlement is received within five working days from date of receipt, the case may be referred to the Department of Justice for appropriate action.

25 CFR 166.24 anticipates that the owner will be the person responsible for allowing livestock trespass on trust or restricted lands. 5/ Although the regulation provides in several place that notice given to an agent of the owner is sufficient, section 166.24(b) clearly states that the owner is liable for trespass damages. The distinction drawn within the regulation between an owner in section 166.24(b) and an owner or agent in other subsections, supports the conclusion that section 166.24(b) does not authorize trespass damages to be assessed against an agent.

[2] The Board concludes that the regulations allow BIA to assess livestock trespass damages against the owner of the trespassing livestock. The regulations do not authorize the assessment of damages against an agent of the owner. Assuming arguendo that appellant could be construed to be an agent of the owner of the livestock, it was not the owner, and BIA therefore erred in assessing trespass damages against it. 6/

Based upon this holding, BIA is ordered to restore to appellant's certificate of deposit the funds removed from it, together with accumulated interest.

5/ Although the Board does not know whether the issue has previously arisen in the field, a review of the livestock trespass cases coming before the Board reveals that the owner was the responsible person in each of those prior cases.

6/ The Board sympathizes with BIA's predicament. Because appellant was responsible for allowing the livestock trespass, and the owner of the cattle may have been an innocent third party, an assessment levied against the owner appears unfair. However, there are judicial mechanisms through which such situations may be resolved. Specifically, in any action brought against the owner of the cattle for trespass damages, the owner could implead appellant, alleging that if he is liable for damages, appellant is liable to him. Although such a proceeding would be more complicated than the present administrative proceeding, it would comport with the regulations and ensure due process to all parties.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the May 7, 1993, decision of the Acting Anadarko Area Director is affirmed in part and reversed in part. 7/

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Kathryn A. Lynn
Chief Administrative Judge

I concur:

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Anita Vogt
Administrative Judge

7/ This decision does not preclude BIA from taking whatever additional actions may be appropriate to recover trespass damages.